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No. 02-1289

In the Supreme Court of the United States

NORTH JERSEY MEDIA GROUP INC., ET AL.,
PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment affords the public a right of access to administrative deportation proceedings for aliens designated by the Executive as linked to the government's ongoing investigation of the September 11th terrorist attacks.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 308 F.3d 198. The opinion of the district court (Pet. App. 65a-99a) is reported at 205 F. Supp. 2d 288.

JURISDICTION

The court of appeals entered its judgment on October 8, 2002. The petition for rehearing initially was denied on December 2, 2002, and an amended order denying rehearing was entered on December 3, 2002 (Pet. App. 100a-103a). The petition for a writ of certiorari was filed on February 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The Attorney General has long been charged with the "administration and enforcement" of "all * * * laws relating to the immigration and naturalization of aliens," including the deportation of aliens who are present unlawfully in the United States. 8 U.S.C. 1103(a)(1), 1227(a) (2002). Deportation proceedings—which the Immigration and Nationality Act now denominates "removal proceedings"—are conducted by immigration judges, 8 U.S.C. 1229a(b), who are part of the Executive Office for Immigration Review within the Department of Justice. See 8 C.F.R. Pt. 1003, 1003.9 *et seq.* (2003). The proceedings are conducted under procedures set forth in regulations established by the Attorney General. See 8 U.S.C. 1229a(b), 1103(a)(3) (authorizing the Attorney General to prescribe "such regulations * * * as he deems necessary"). A regulation in force since 1964 permits the closure of removal hearings "[f]or the purpose of protecting witnesses, parties, or the public interest." 8 C.F.R. 1003.27 (2003); see also 8 C.F.R. 3.27 (1992); 8 C.F.R. 3.25 (1987); 29 Fed. Reg. 13,241, 13,243 (1964). Since April 1997, that regulation also has mandated the closure of removal hearings for abused alien children and spouses. See 8 C.F.R. 1003.27 (2003); 62 Fed. Reg. 10,334, 10,335 (1997).[1]

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[1] The Homeland Security Act of 2002, Pub. L. No. 107-296, § 1102(2), 116 Stat. 2273, and the Homeland Security Act of 2002 Amendments, Pub. L. No. 108-7, Div. L, § 105(a)(1), 117 Stat. 531, transferred responsibility for administration and enforcement of the immigration and naturalization laws to the Secretary of Homeland Security, effective March 1, 2003. However, the Attorney General retains such "powers, functions, and duties" as are conferred by statute, including the administrative adjudication of removal proceedings, and the Secretary's administration and

2. On September 11, 2001, the al Qaeda terrorist network attacked the United States, murdering thousands of innocent civilians. In response, the President ordered and Congress approved the use of "all necessary and appropriate force against those nations, organizations, or persons" determined by the President to have "planned, authorized, committed, or aided the terrorist attacks." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224. Congress found that terrorists "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States," and stressed the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Ibid.*

The federal government immediately launched an intensive investigation both to identify those responsible for the September 11th attacks and to detect and prevent future terrorist attacks. Gov't C.A. App. 80-81 (Watson Decl.). In the course of that investigation, the government became aware of numerous aliens who were present in this country in violation of the immigration laws, some of whom were detained and placed in removal proceedings. *Id.* at 80-82. Some of those aliens, as well as some aliens already in government custody, were identified as "special interest" cases on the basis of law-enforcement or intelligence information that they "might have connections with, or possess information pertaining to, terrorist activity," such as close associations with the September 11th hijackers or with al Qaeda or related groups. *Id.* at 82.

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enforcement activities are also subject to the Attorney General's "determination and ruling * * * with respect to all questions of law[, which] shall be controlling." 8 U.S.C. 1103(a)(1) (2002).

Ten days after the terrorist attacks and in conjunction with the ongoing law enforcement investigation, the Attorney General implemented revised procedures for immigration proceedings in special interest cases. In conjunction with that effort, Chief Immigration Judge Michael Creppy issued a memorandum to all immigration judges and court administrators concerning the handling of immigration cases arising out of the terrorism investigation. Gov't C.A. App. 54-57 (Creppy Memorandum). In pertinent part, the Creppy Memorandum instructs immigration judges and court administrators to "close * * * to the public" administrative hearings in all special interest cases. *Id.* at 54. The memorandum also bars public access to the administrative record and docket information in such cases. *Id.* at 55.

The Creppy Memorandum was issued to protect the national security and public safety by preventing sophisticated terrorist organizations like al Qaeda from learning about the government's ongoing terrorism investigation. Gov't C.A. App. 83-88 (Watson Decl.). The closure policy protects against disclosure of both obviously sensitive information—such as evidence that the government knows of particular links between a detainee and terrorist activity—and also information the significance of which may not be apparent in isolation, but that can be "fit into a bigger picture by terrorist groups in order to thwart the Government's efforts to investigate and prevent terrorism." *Id.* at 83. Public disclosure during removal hearings of information about how and why special interest aliens were detained, for example, "would allow the terrorist organization to discern patterns and methods of investigation"; information about how such aliens entered the country "would allow the terrorist organization to see

patterns of entry, what works and what doesn't"; information "about what evidence the United States has against members of a particular cell collectively" would reveal to the terrorist organization which of its cells have been significantly compromised and, by indirection, which have not, and would allow terrorists "to alter their plans in a way that presents an even greater threat to the United States." *Id.* at 84. In addition, disclosure of information the government possesses, as well as indications of what information the United States does *not* possess, could allow terrorist organizations to evade detection, alter future attacks, obstruct pending proceedings, and deter cooperation with the government's ongoing terrorism investigation. *Id.* at 86-87. Finally, disclosure would intrude upon the privacy interests of those aliens, witnesses, and lawyers, who may not wish to be associated publicly with the September 11th investigation.

During the course of the government's investigation, approximately 766 detainees were designated as "special interest" cases, 611 of whom had one or more administrative hearings closed in accord with the Creppy Memorandum. Some of those aliens were subsequently transferred to law enforcement authorities for criminal prosecution (such as Zacarias Moussaoui). Approximately 505 of those special interest aliens have already been deported.[2] In addition, because government

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[2] That an alien was deported rather than prosecuted does not mean that the alien had no knowledge of or connection to terrorism. In many cases, the Department of Justice determined that the best course of action to protect national security was to remove potentially dangerous individuals from the Country and ensure that they cannot return. Nor may such an inference be drawn from the fact that an alien was deported on grounds facially unrelated to terrorism. Such charges would have been withheld, for

investigators continued to reevaluate the progress, direction, and circumstances of the investigation and "special interest" designations arising out of it, some aliens who were initially designated as "special interest" cases were subsequently removed from that category. See Gov't C.A. App. 83 (Watson Decl.).

3. Petitioners, a newspaper and a publisher, brought a First Amendment challenge to the Creppy Memorandum, seeking injunctive relief permitting public access to removal proceedings for special interest aliens. The district court held that the press and public have a First Amendment right to attend immigration removal hearings under *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (plurality), which found a First Amendment right of access by the public to criminal proceedings in court. The court concluded that closure under the Creppy Memorandum unconstitutionally infringed on the public's First Amendment rights. Pet. App. 65a-99a. The district court granted a nationwide injunction in favor of petitioners prohibiting enforcement of the Creppy Memorandum and barring the government "from closing to the public any immigration proceedings in the absence of case-specific findings demonstrating that closure is narrowly tailored to serve a compelling governmental interest." *Id.* at 99a.

The district court and the Third Circuit denied the government's motions for a stay pending appeal. The government subsequently applied for and obtained a stay in this Court, which ordered that the district court's injunction be "stayed pending the final disposition of the government's appeal of that injunction to the United States Court of Appeals for the Third Circuit."

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example, if their assertion could have compromised ongoing investigations or sensitive intelligence matters.

Ashcroft v. *North Jersey Media Group, Inc.*, 122 S. Ct. 2655 (2002).

4. The court of appeals reversed the district court's injunction. Pet. App. 1a-64a. As an initial matter, the court of appeals held that the government's argument that there is no First Amendment right of access to administrative proceedings was foreclosed by circuit precedent, although it described the notion that the *Richmond Newspapers* test applies to administrative proceedings as "open to debate as a theoretical matter." Pet. App. 5a.

Applying the test outlined in *Richmond Newspapers* and its progeny for identifying a constitutional right of access to judicial proceedings in criminal cases, the court of appeals held that there was no "history of access to political branch proceedings" in general, and that both Congress and the Executive Branch had long excluded and continue to exclude the public from sensitive government proceedings and records. Pet. App. 23a-24a. Even in the limited context of removal proceedings, the court noted, the practice of public access was far too "recent and inconsistent" to be the basis for a constitutional requirement of open proceedings. *Id.* at 26a. The court noted that, since the 1890s, the governing statute expressly required closed *exclusion* proceedings, *id.* at 26a-27a & nn.8, 9; see also 8 C.F.R. 1003.27 (2003), and that historically, deportation proceedings were frequently held in places to which the public lacked free access, Pet App. 29a-30a. While a more recent regulation, now codified at 8 C.F.R. 1003.27 (2003), provides that certain types of removal proceedings are open unless closed "[f]or the purpose of protecting witnesses, parties, or the public interest," the court reasoned that this "recent—and rebuttable—regulatory presumption is hardly the stuff of which

Constitutional rights are forged." Pet. App. 30a. Basing a constitutional right of access on that regulation, the court concluded, would improperly interfere with agencies' authority to set their own procedures and would have the "ironic[]" and "incredible" result of discouraging agencies from opening their proceedings to the public. *Id.* at 36a-37a.[3]

The court also held that the "logic" prong of the *Richmond Newspapers* test—which asks whether openness would play a positive role in the proceedings, 448 U.S. at 569-573—failed to support a right of public access to removal hearings in special interest cases. The court reasoned that considering solely the benefits of public access would render the "logic" inquiry essentially meaningless, because access to any government proceeding would appear to "serve[] some good." Pet. App. 39a. Instead, the court weighed the public interest in access against the potential harms arising from open proceedings, and concluded that allowing public access could significantly harm the national security and the effectiveness of the government's terrorism investigation by revealing sensitive and confidential

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[3] The court rejected petitioners' argument that *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), required it to recognize a First Amendment right of access based on certain functional similarities between the procedures employed in removal proceedings and those used in judicial trials. Pet. App. 33a-34a. The court explained that the fundamental premise in *South Carolina Ports* was that the Framers intended for "state sovereign immunity [to] shield[] nonconsenting states from complaints brought by private persons, regardless of where private persons bring those complaints." *Id.* at 34a. No comparable premise applied here, the court reasoned, given the lack of a "fundamental right to attend government proceedings." *Id.* at 35a.

information. On balance, and giving due deference to Executive Branch judgments about national security, the court determined that public access could not be said to "play a positive role in special interest deportation hearings." *Id.* at 44a-45a.

Judge Scirica dissented, arguing that the lack of a statute closing removal proceedings and the existence of a regulatory presumption of openness in certain classes of proceedings showed a "history" of public access under *Richmond Newspapers*. Pet. App. 47a-53a. Judge Scirica also criticized the majority for considering the harms of public access only to special interest cases, although he "agree[d] that national security would likely trump the arguments in favor of access" in special interest cases and found the government's interests in closure to be so "exceedingly compelling" that "[c]losure in some—or perhaps all—special interest cases may be necessary and appropriate." *Id.* at 54a-56a, 59a.

ARGUMENT

The decision of the court of appeals is correct, because there is no First Amendment right of public access to Executive Branch proceedings in general or to removal proceedings involving special interest aliens in particular. Petitioners accurately note that the Third and Sixth Circuits have issued divergent opinions concerning public access to the removal hearings of special interest aliens. Nevertheless, an exercise of this Court's certiorari jurisdiction at this time is not warranted, for three reasons. First, because the Sixth Circuit's contrary decision permitting access affirmed a preliminary injunction limited to the removal proceedings for one individual, who has now been ordered removed and whose case is no longer pending before

any immigration judge, the conflict in the circuits is not sufficiently pressing or mature to warrant this Court's resolution. Second, the passage of time has all but exhausted the class of special interest aliens currently facing proceedings before an immigration judge. Third, the government's ongoing examination and review of its procedures and regulations for handling immigration proceedings in cases implicating national security, intelligence, and law enforcement interests, particularly in the context of combating international terrorism, suggests that review at this juncture would be premature.

1. Petitioners argue (Pet. 17-20) that this Court should grant review to resolve a conflict between the Third and Sixth Circuits over whether the public has a constitutional right of access to the removal hearings of special interest aliens.

In *Detroit Free Press* v. *Ashcroft*, 303 F.3d 681 (2002), the Sixth Circuit held that the public has a First Amendment right of access to the removal proceedings for an individual alien, Rabih Haddad, comparable to the access afforded the public in criminal cases under *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). See 303 F.3d at 694-705. The Sixth Circuit found the requisite history of public openness in deportation hearings based on the absence of a statute closing such hearings, and on a 38-year-old regulation (8 C.F.R. 1003.27 (2003); see also 8 C.F.R. 3.27 (1992); 8 C.F.R. 3.25 (1987); 29 Fed. Reg. 13,241, 13,243 (1964)), which provides that deportation hearings may be closed, *inter alia*, to protect witnesses, parties, and the public interest, and which, since 1997, has mandated closure in cases involving abused alien children and spouses. See 303 F.3d at 700-703.

Having identified what it perceived to be a tradition of public access to deportation hearings, the court held that the Creppy Memorandum was insufficiently tailored to survive strict scrutiny. See *Detroit Free Press*, 303 F.3d at 705-711. The court acknowledged that the government has a compelling interest in protecting national security and the integrity of its investigation, *id.* at 706, but that interest, the court believed, could be adequately protected by making closure decisions on a case-by-case or hearing-by-hearing basis, *id.* at 708-710. The court dismissed as speculative the government's concern that the sensitivity of information will not always be apparent or provable on a piecemeal basis. *Id.* at 707, 709, 710.

The Sixth Circuit then ordered the government to provide public access to all future removal proceedings for Haddad, unless the government demonstrated a particularized need to close a hearing, and to disclose transcripts and related documents from Haddad's past proceedings. The government complied with that order, closing only portions of Haddad's subsequent proceedings to protect sensitive source-identifying material. Haddad's removal proceedings before the immigration judge have now been completed, and he has been ordered removed. In issuing the order, the immigration judge specifically found that Haddad poses "a substantial risk to the national security of the United States," on the basis of his direct ties to a "Specially Designated Global Terrorist" organization and other information contained in a sealed declaration. *In re Removal Proceedings for Rabih Sami Haddad,* No. A 79 546 461 (Immg. Ct. Nov. 22, 2002), slip op. 14-15.[4]

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[4] Haddad's appeal of his removal order and a separate order denying him release on bond are currently pending before the

While the government disagrees with the Sixth Circuit's order, it directly pertained only to proceedings concerning Haddad, whose identity and background had already been widely disseminated in the press. Moreover, Haddad's removal proceedings before the immigration judge are now complete. Indeed, immigration proceedings have now been completed for virtually all of the "special interest" aliens nationwide. As of the filing of this brief, only one "special interest" alien faces any realistic possibility of future immigration proceedings before an immigration judge.[5] As a result,

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Board of Immigration Appeals. Proceedings before that tribunal are not governed by the Creppy Memorandum, and the court of appeals' decision did not address a public right of access to such administrative appeals.

[5] With respect to that one alien, removability has already been established because the alien is subject to a prior final order of removal that has been reinstated following his illegal reentry into the United States, see 8 U.S.C. 1231(a)(5). Because the alien has requested withholding of removal, he will be entitled to a hearing before an immigration judge on his application for relief if he can make a threshold showing of a "reasonable fear of persecution or torture." 8 C.F.R. 241.8(e), 208.31. But wholly apart from the Creppy Memorandum, such a proceeding would separately be subject to closure under a regulation providing for closure of proceedings on applications for asylum or withholding of removal upon the request of the alien in order to protect his privacy and safety. See 8 C.F.R. 1240.11(c)(3)(i) (2003).

There are three other aliens in the United States who remain designated as "special interest" cases and have a theoretical possibility of facing further immigration proceedings. In reality, however, they face no reasonable likelihood of proceedings before an immigration judge at any time in the foreseeable future, if at all. One of those aliens is Haddad who, as noted *supra*, has completed his proceedings before the immigration judge and been ordered removed. The second alien has been transferred from the custody of the Bureau of Immigration and Customs Enforcement (for-

the Sixth Circuit's ruling, though inconsistent with the decision of the Third Circuit in the case at hand, has little continuing practical effect for the government.

Finally, the governmental procedures and regulations that gave rise to the present litigation are currently under review and will likely be revised to reflect the government's practical experience dealing with these unique cases, the government's increased knowledge about terrorism threats and operations, and overall governmental restructuring designed to enhance the security and effectiveness of its response to terrorist threats and attacks. For example, the Department of Justice is reviewing the process for designating individuals as special interest aliens and the interagency processes for identifying immigration matters that implicate national security, intelligence matters, or sensitive law-enforcement proceedings.

In addition, the Executive Office for Immigration Review in the Department of Justice has already promulgated and is applying in appropriate circumstances an emergency interim regulation authorizing immigration judges to issue protective orders, accept documents under seal, and close proceedings where protected information may be discussed. See 67 Fed. Reg. 36,799 (2002) (codified at 8 C.F.R. 1003.46 (2003)). The government is currently reviewing this interim regulation in light of post-promulgation notice and comment, as well as practical experience arising from application

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merly, the Immigration and Naturalization Service) in connection with criminal proceedings and, in any event, already has a final removal order. The third alien is neither in active proceedings nor expected to face such proceedings in the foreseeable future because his case has been administratively closed.

of the regulation to protect sensitive information in individual cases.

In conjunction with its review of the emergency regulation, the government is also reviewing the Creppy Memorandum (which was issued in the immediate wake of the September 11th attacks), the closure regulation (now codified at 8 C.F.R. 1003.27 (2003)), and their accompanying governmental procedures. The government is undertaking that review with an eye to establishing comprehensive, integrated procedures to enhance the efficiency and effectiveness of the government's handling of acutely sensitive immigration proceedings like these in the future. Because changes resulting from this ongoing review process could alter substantially the very framework in which the constitutional question arose in this case and in *Detroit Free Press*, review at this juncture would be premature.[6]

2. Further review is also unnecessary because the Third Circuit's rejection of petitioners' facial challenge to the closure policy was correct. There is no general right of public access to Executive Branch proceedings or records. This Court has made it clear that there is no broad right of access to government *facilities*, see, *e.g.*, *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 14 (1978), or to government *records* or *information*, see, *e.g.*, *Los Angeles Police Dep't* v. *United Reporting Publ'g Co.*, 528 U.S. 32, 40 (1999). Nor is there any established right of access to government *proceedings*—"the press is regularly excluded from grand jury proceedings, [Supreme Court] conferences, [and] the meetings of

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[6] There are no other pending challenges to the closure of removal proceedings of special interest aliens subject to the Creppy Memorandum.

other official bodies gathered in executive session." *Branzburg* v. *Hayes*, 408 U.S. 665, 684-685 (1972).

The limited exception to those principles recognized by this Court in *Richmond Newspapers*, *supra*, was premised on a 1000-year "unbroken, uncontradicted history" of public access to criminal trials in Anglo-American law, running from "before the Norman Conquest" to the present. 448 U.S. at 565-573. The Constitution itself, U.S. Const. Amend. VI, reflects that historic practice. That tradition has no counterpart in the proceedings of the political Branches, to which the Constitution expressly grants only limited rights of access, see U.S. Const. Art. II, § 3; *id.* Art. I, § 5, Cl. 3; *id.* Art. I, § 9, Cl. 7; see also Pet. App. 23a-24a; *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring) ("I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials."). Consistent with that tradition of allowing for closure of proceedings by the political Branches, numerous Executive agencies have regulations that provide for non-public hearings—including, for example, under the vast Social Security program. See Pet. App. 24a-25a.

Nor is there any significant history of access to immigration proceedings in particular. By tradition, such hearings have either been categorically closed or subject to closure at the discretion of the administrator or the alien. Proceedings to exclude aliens detained at the border have been closed by statute or regulation for more than a century. See, *e.g.*, Act of Mar. 3, 1903, ch. 1012, § 25, 32 Stat. 1213; 8 C.F.R. 1240.32(a), 1240.11(c)(3)(i) (2003). Immigration proceedings (including removal proceedings) involving an abused alien child or spouse are closed by regulation. See 8 C.F.R.

1003.27(c) (2003). Asylum proceedings may be closed at the alien's request. See 8 C.F.R. 1240.11(c)(3)(i) (2003). All other immigration proceedings may be closed "[f]or the purpose of protecting witnesses, parties, or the public interest." 8 C.F.R. 1003.27(b) (2003). The Third Circuit properly recognized that a regulation containing such a broad reservation of closure authority "in the public interest" cannot furnish a basis for recognizing a *constitutional* right of access to the very category of hearings for which the regulations permit closure.

Finally, in determining that there is no First Amendment right of access to removal proceedings in special interest cases, the court of appeals properly considered both the obvious harms that could result from public access as well as the asserted benefits of such access. The court of appeals explained, in particular, that "public hearings would necessarily reveal sources and methods of investigation" to terrorist organizations monitoring the proceedings. Pet. App. 40a. Information about how and where individual aliens entered the country would give valuable information to terrorist organizations about the best means of entry to evade detection. *Id.* at 40a-41a. Information about what evidence the government has against members of a particular terrorist cell (and what evidence the government lacks) would assist terrorists in determining which cells to use for attack. *Id.* at 41a. Information that a particular alien had been detained or an attack plan discovered would permit terrorist organizations to accelerate the timing of a planned attack or to staff it with aliens who had not been detected. *Ibid.* Closed proceedings also protect aliens and potential witnesses, many of whom "have a substantial privacy interest in having their possible connection to the ongoing investigation kept undisclosed." *Id.* at 42a. Finally, case-by-

case (or hearing-by-hearing) closure determinations could themselves "expose critical information about which activities and patterns of behavior merit such closure," and create a risk that judges will erroneously conclude that individual cases, viewed in isolation, are not "sensitive enough to warrant closure." *Ibid.* The Executive's decision to close all proceedings involving particular categories of aliens, by contrast, allows consideration of the risks of disclosure without the possibility of harmful disclosure inherent in case-by-case or hearing-by-hearing proceedings.[7]

Quite apart from the harms that would result from opening removal proceedings involving special interest aliens to the press and public, removal proceedings in general are quite distinct from criminal trials, in ways that cut strongly against recognizing a First Amendment right of access. This Court has stressed that immigration matters are "vitally and intricately interwoven with contemporaneous practices in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," and for that reason are "so exclusively entrusted to the

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[7] In addition to arguing that closed proceedings violate their asserted First Amendment right of access, petitioners claim (Pet. 29) that the Creppy Memorandum violates immigration regulations. But closure under the Creppy Memorandum is fully consistent with regulations permitting closure "[f]or the purpose of protecting witnesses, parties, or the public interest," 8 C.F.R. 1003.27(b) (2003). See *Lopez* v. *Davis*, 531 U.S. 230, 243-244 (2001); see also 8 C.F.R. 1003.9 (2003) (allowing the Chief Immigration Judge to "[e]stablish[] operational policies"). Furthermore, petitioners lack a private, third-party right of action to enforce those regulations, see *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). In any event, that argument was not addressed or ruled on by the court of appeals and does not involve a conflict in authority.

political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952). The framework of strict scrutiny that petitioners seek to impose on the exercise of the power over immigration can scarcely be described as satisfying that requirement of deference. Under petitioners' approach (see Pet. 23, 25-26), each decision of each immigration judge to close any particular immigration hearing apparently would be subject to reexamination by the federal courts whenever the press or any member of the public sought to challenge a closure decision. That collateral litigation could cause serious delays in removal proceedings as the courts resolved whether the closure decision was warranted under strict scrutiny. It also would bristle with the possibility of unwitting disclosures and inappropriate judicial second-guessing of the Executive Branch's judgment that sensitive law-enforcement or national-security information should be shielded from public disclosure. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-491 (1999) (relying on similar concerns to reject a First Amendment-based "selective prosecution" defense to deportation).

Moreover, as the Court further explained in *American-Arab Anti-Discrimination Committee*, removal proceedings are not punitive in nature: "Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted." 525 U.S. at 491. That central premise of the Nation's immigration laws undermines petitioners' argument that it is necessary to extend the First Amendment right of access

recognized in criminal prosecutions to immigration proceedings in order to ensure the proper functioning of those laws.

In *Richmond Newspapers*, the Court rested its conclusion that the First Amendment secured a right of public access to criminal trials in large part on the fact that criminal trials seek to right a wrong done to particular victims and the public and serve a function of catharsis, thus precluding the possibility of vigilante justice. See 448 U.S. at 571. Immigration proceedings, by contrast, do not seek to right a wrong done to private individuals or the general public in that same way. Rather, they are intended to give effect to a sovereign determination that the presence of a particular kind of alien in the United States does not promote the national interest. Many aliens who are placed in removal proceedings are out of status or were never lawfully present in this Country in the first place. Moreover, in most cases, such as those just described, the facts rendering the alien removable are not even disputed, and frequently the only issue is whether the alien's application for discretionary relief from the Executive will be granted. That sort of discretionary determination by the Executive, which is akin to granting a pardon, see *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996), bears no resemblance to the criminal judicial proceedings that *Richmond Newspapers* and its progeny addressed.

In short, the court of appeals in the instant case properly declined to transmogrify a highly discretionary contemporary regulation that authorizes closure of immigration hearings to protect witnesses, parties, or the public interest, into a broad constitutional mandate of access to Executive Branch immigration proceedings. The court likewise properly acknowledged the

substantial structural barriers to constitutionalizing judicial superintendence of the Executive Branch's judgment that open proceedings would threaten vital national security, intelligence, and law-enforcement interests. While the Sixth Circuit's contrary decision in *Detroit Free Press* was, the government submits, wrongly decided, it has little practical impact at the present time, and the internal Executive Branch framework in which both this case and *Detroit Free Press* arose is under review. Accordingly, review by the Court of the constitutional question raised by petitioners is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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